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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION TWO

BLUE WATER SUNSET, LLC,

Plaintiff and Appellant,

v.

FIRST VIEW, LLC, et al.,

Defendants and Respondents.

B204012

(Los Angeles County
Super. Ct. No. BC316696)

APPEAL from a judgment of the Superior Court of Los Angeles County.
Irving S. Feffer, Judge. Affirmed.

Philip D. Dapeer and Yana Henriks for Plaintiff and Appellant.

Law Office of Gary Kurtz and Gary Kurtz for Defendants and Respondents
Four Star General Properties, LLC and Philip Markowitz.

Blue Water Sunset, LLC (Blue Water) appeals the judgment of dismissal in favor of respondents Four Star General Properties, LLC (Four Star) and Douglas Kramer (Kramer)¹ after a demurrer to Blue Water's twelfth and thirteenth causes of action was sustained without leave to amend.² According to the trial court, Blue Water's claims are derivative in nature and it did not and could not plead satisfaction of the pleading requirements for derivative actions in Corporations Code section 800, subdivision (b). We find no error and affirm.

The pleading

Blue Water sued Markowitz, Rail Prop, First View and Investment Group in multiple causes of action for, inter alia, dissolution, appointment of receiver, breach of contract, breach of fiduciary duty, accounting, declaratory relief and fraud. Four Star and Kramer were sued individually and derivatively in the twelfth and thirteenth causes of action for fraud and fraudulent conveyance.³

¹ Kramer did not file a respondent's brief. He unsuccessfully attempted to join Four Star's brief without filing a separate brief. As to Kramer, we proceed under California Rules of Court, rule 8.220. We are permitted to decide issues relative to Kramer on the record, opening brief and oral argument.

² Blue Water purported to appeal from the October 1, 2007, order sustaining the demurrer without leave to amend as to Philip Markowitz (Markowitz), Four Star, Rail Prop, LLC (Rail Prop), First View, LLC (First View), Markowitz Investment Group, LLC (Investment Group), and Kramer. That order was not appealable. As a matter of discretion, we opt to "save" the appeal by construing it as an appeal from the judgment of dismissal entered on October 15, 2007, in favor of Four Star and Kramer. (*Vibert v. Berger* (1966) 64 Cal.2d 65, 67–68.) Though the order sustaining the demurrer to the twelfth and thirteenth causes of action also pertains to Markowitz, Rail Prop, First View and Investment Group, the dismissal does not. This is with good reason. They could not be dismissed because they are defendants in other causes of action that were not challenged by demurrer. As a result, Blue Water cannot appeal as to Markowitz, Rail Prop, First View and Investment Group. This appeal, then, only pertains to Four Star and Kramer.

³ Kramer is mentioned by name in the twelfth cause of action but not the thirteenth cause of action. Both causes of action purport to be against all defendants. Also, because the twelfth cause of action alleges that Kramer received conveyances from Markowitz for

As alleged: Blue Water is a 50 percent member of First View, Rail Prop and Investment Group (collectively limited liability companies). Markowitz claims that he is also a 50 percent member, and that he is their sole manager. He breached his fiduciary duty to Blue Water with respect to his operation and management of the limited liability companies by misappropriating income without an accounting; entering into contracts for the lease of the real property assets of the limited liability companies without Blue Water's knowledge or consent; incurring liabilities on behalf of the limited liability companies without Blue Water's knowledge or consent; and conveying assets to others, including Four Star. Markowitz accomplished his scheme through a conspiracy with Kramer. Kramer acted as a "straw purchaser" of real property assets for Markowitz's benefit. The conveyances made to Four Star and others (which presumably includes Kramer) lacked consideration and were accomplished without Blue Water's knowledge or consent. As a consequence, those conveyances were fraudulent and must be set aside.

The demurrer

Four Star and Kramer demurred on several grounds, including that claims for fraud and fraudulent conveyance were derivative actions and Blue Water failed to allege that it informed the limited liability companies or their boards of directors in writing of the facts supporting each cause of action, or that it delivered a copy of a proposed complaint to them. As a result, Blue Water lacked standing to pursue a derivative action. Further, the fraud claim was time-barred and the fraudulent conveyance claim was defective because Blue Water did not allege that it is a creditor with a right to payment, that the limited liability companies are insolvent, and that Blue Water has been prejudiced.

In opposition, Blue Water partially relied on the memorandum of points and authorities it previously filed in opposition to a motion for judgment on the pleadings.

his benefit, and because the thirteenth cause of action seeks to set aside any conveyances from Markowitz for his benefit, we presumed that Blue Water intended to sue Kramer in connection with the thirteenth cause of action. If not, it is of no moment. One way or the other, this opinion remains the same.

By incorporation, Blue Water therefore argued that the claims were not derivative because they sought compensation for direct injury rather than injury to the limited liability companies. Additionally, Blue Water argued that because the limited liability companies are not members of Four Star, Blue Water could not sue Four Star on a derivative basis.

The hearing and ruling

Four Star and Kramer appeared for the hearing on their demurrer. Blue Water submitted on the papers and did not appear. Four Star and Kramer argued that Blue Water lacked standing to pursue derivative claims, and that because it did not suggest that it could amend the pleading, the demurrer should be sustained without leave to amend. The trial court agreed and sustained the demurrer without leave to amend.

The written order set forth the trial court's reasoning. The claims for fraud and fraudulent conveyance were derivative and Blue Water did not and could not satisfy the requirements of Corporations Code section 800, subsection (b)(2). Both claims were barred by the three-year statute of limitations. Finally, Blue Water could not plead the elements of a fraudulent conveyance claim.

Judgment was entered.

This timely appeal followed.⁴

STANDARD OF REVIEW

When a trial court sustains a demurrer without leave to amend, we independently analyze the pleading to determine whether it alleges facts sufficient to state a cause of action under any legal theory. (*Cantu v. Resolution Trust Corp.* (1992) 4 Cal.App.4th 857, 879.) In doing so, we are obligated to treat the demurrer as admitting all material facts properly pleaded. (*Aubry v. Tri-City Hospital Dist.* (1992) 2 Cal.4th 962, 967.) A complaint's allegations "must be liberally construed with a view to attaining substantial

⁴ We hereby grant Blue Water's motion to augment the record on appeal to include the complaint and first, second and third amended complaints.

justice among the parties. [Citations.]” (*Kotlar v. Hartford Fire Ins. Co.* (2000) 83 Cal.App.4th 1116, 1120.)

We review the trial court’s denial of leave to amend for an abuse of discretion. (*Blank v. Kirwan* (1985) 39 Cal.3d 311, 318.) “When a demurrer is sustained without leave to amend, we determine whether there is a reasonable probability that the defect can be cured by amendment. [Citation.]” (*V.C. v. Los Angeles Unified School Dist.* (2006) 139 Cal.App.4th 499, 506.)

DISCUSSION

1. Fraud.

Blue Water argues that the fraud claim can be asserted individually and that, regardless, it alleged notice in accordance with Corporations Code section 800. Blue Water seems to suggest that Kramer’s demurrer was defective, but Blue Water does not say how. Finally, Blue Water suggests that because it alleged that Markowitz is Four Star’s alter ego, Four Star should have been kept in this action as a defendant. After review, we find no basis for reversal.

a. *The claim was derivative.*

Blue Water cites *Denevi v. LGCC, LLC* (2004) 121 Cal.App.4th 1211 (*Denevi*) for the proposition that if its fraud claim is based upon Markowitz’s breach of fiduciary duty, then Blue Water can allege an individual claim. But *Denevi* was not cited to the trial court. This argument was waived. (*Doers v. Golden Gate Bridge Etc. Dist.* (1979) 23 Cal.3d 180, 184–185, fn. 1.) Nonetheless, to be complete, we have analyzed Blue Water’s argument.

A derivative action permits a shareholder to sue to “redress a wrong done by someone to the corporation and make the corporation, in effect, an involuntary plaintiff in that action (although formally named as a defendant).” (Marsh et al., *Marsh’s Cal. Corp. Law* (4th ed. 2000) § 15.11[A], p. 15-59 (Marsh).) The action involves a breach of duty owed by a third person to the corporation. (*Ibid.*) “On the other hand, if a plaintiff sues officers or directors of the corporation to obtain an individual recovery in his or her own favor (not running in favor of the corporation as in a derivative action), such a lawsuit

must be based upon an alleged breach of duty owed by the [third party] directly to the plaintiff, rather than to the shareholder indirectly through the corporate entity.” (Marsh, *supra*, at p. 15-60.)

When a third party reduces or diverts corporate assets, a derivative action is the appropriate remedy. (Marsh, *supra*, § 15.11[A][1], pp. 15-61, 15-64.) Similarly, “[w]hen managing officers are charged with misfeasance or negligence that results in a loss of assets, this is an injury to the corporation that may be redressed in a derivative action. However, despite a loss in share value, a shareholder has no personal action for indirect injuries in this type of case. [Citations.]” (9 Witkin, Summary Cal. Law (10th ed. 2005) Corporations, § 175, p. 947; *Nelson v. Anderson* (1999) 72 Cal.App.4th 111, 124 (*Nelson*) [a shareholder cannot file an individual action against a corporation’s directors for the destruction or diminution of stock value].)

These principles apply to limited liability companies. As one court explained, when the essence of a claim is that a limited liability company’s assets were fraudulently transferred, “[t]his constitutes an injury to the company itself. Because members of the [limited liability company] hold no direct ownership interest in the company’s assets . . . , the members cannot be directly injured when the company is improperly deprived of those assets. The injury [is] essentially a diminution in the value of their membership interest in the [limited liability company] occasioned by the loss of the company’s assets.” (*Paclink Communications Internat., Inc. v. Superior Court* (2001) 90 Cal.App.4th 958, 964, fn. omitted [*Paclink*].) Members of a limited liability company cannot sue individually for injury to the company. (*Id.* at p. 965.)

Blue Water alleged that Markowitz misappropriated money, conveyed and leased real property owned by the limited liability companies, and incurred liabilities on behalf of the limited liability companies. These allegations establish damage to the limited liability companies, not to Blue Water directly. Only the limited liability companies lost assets and money.

Denevi does not alter our conclusion.

In *Denevi*, the plaintiff sued Swenson, Green Valley Corporation (Green Valley) and LGCC, LLC (LGCC) for fraudulently inducing him to join their venture to develop property and give up his right to purchase the property. The trial court granted summary judgment for the defendants on the theory that the plaintiff had already successfully prosecuted a derivative action for the same loss. (*Denevi, supra*, 121 Cal.App.4th at p. 1214.) The appellate court reversed. The derivative action was based on LGCC's loss of the purchase rights when the defendants failed to deposit the entire down payment into escrow. The plaintiff's individual fraud claim, filed in a separate action, "rested on the legal injury that he suffered at the moment the defendants induced him to part with his purchase rights." (*Id.* at pp. 1218, 1219.)

It is plain to see that Blue Water's claim is based on Markowitz's mismanagement of the limited liability companies' assets and not on an inducement of Blue Water to give up legal rights, as in *Denevi*. As a result, the fraud claim is derivative. It must comply with the notice requirements.

b. *Blue Water did not plead the notice requirements.*

A holder of shares or voting trust certificates cannot sue on behalf of a corporation unless "[t]he plaintiff alleges in the complaint that plaintiff was a shareholder . . . or the holder of voting trust certificates" and the plaintiff alleges with "particularity" its efforts to secure action from the board or the reasons for not making such effort, and further alleges that the plaintiff informed the corporation or board in writing of the ultimate facts of each cause of action or delivered a copy of the complaint "which plaintiff proposes to file." (Corp. Code, § 800, subs. (b)(1), (b)(2).) Written notice of the ultimate facts or service of the proposed pleading must be given before an action is filed. (*Nelson, supra*, 72 Cal.App.4th at p. 127.) "Failure to comply with the requirements of the statute deprives a litigant of standing." (*Id.* at pp. 127–128.)

According to Blue Water, it satisfied Corporations Code section 800, subdivision (b) in paragraphs 9, 16, 25, 72, 73 and 74 of the fourth amended complaint. Paragraph 9 alleges: "The Operating Agreement of [First View] . . . gives [Blue Water] as a member of [First View] the right to inspect the company's books and records and to receive

information. On April 12, 2004, [Blue Water] made a formal request to [First View] in care of [Markowitz] for the books and records and information. . . . [First View] and [Markowitz] have failed and refused and continue to fail and refuse to comply with [Blue Water's] request." Paragraphs 16 and 25 are the same, except they pertain to Rail Prop and Investment Group respectively. Paragraphs 72 and 73 allege that Blue Water attempted but failed to secure action from the limited liability companies to pursue the alleged claims because Markowitz refused to prosecute the claims against himself, Four Star and others. Due to Markowitz's recalcitrance, Blue Water's attempts to obtain action were futile.

Paragraph 74 alleges that the limited liability companies "have had notice of the ultimate facts of each cause of action herein alleged as against each defendant by virtue of the service of the summons and complaint in this action, the service of the amended complaints, and the receipt by the defendant limited liability companies of the amended complaint prior to the hearing on the Markowitz motion for judgment on the pleadings seeking to require [Blue Water] to plead the Twelfth and Thirteenth causes of action as derivative claims."

These paragraphs are wholly defective. They do not allege that the limited liability companies or their boards were informed in writing of the ultimate facts supporting the claims or served with a copy of the proposed pleading before the action was commenced. Because Blue Water did not comply with Corporations Code section 800, subdivision (b), it lacks standing to sue.

Blue Water impliedly suggests that if it was futile to demand action from the limited liability companies, it did not have to comply with Corporations Code section 800, subdivision (b)(2). In particular, it appears that Blue Water believes it did not have to give the limited liability companies written notice of the ultimate facts or serve the proposed pleading prior to filing suit. Blue Water did not cite any supporting law in the opening brief. "It is not our responsibility to develop an appellant's argument." (*Alvarez v. Jacmar Pacific Pizza Corp.* (2002) 100 Cal.App.4th 1190, 1206, fn. 11.) Further, "every brief should contain a legal argument with citation to authorities on the points

made. If none is furnished on a particular point, the court may treat it as waived, and pass it without consideration.’ [Citation.]” (*Sprague v. Equifax, Inc.* (1985) 166 Cal.App.3d 1012, 1050.) In any event, Corporations Code section 800, subdivision (b)(2) is conjunctive. Regardless of whether a plaintiff alleges a demand or futility of a demand, the plaintiff must also allege written notice of the facts. According to one treatise, “The additional requirement of the statute as to the delivery to the corporation of a copy of the complaint prior to filing is, of course, a purely mechanical one that is easily satisfied, since no time period is specified for the delivery of such copy prior to the time it is filed with the [trial court].” (Marsh, *supra*, § 15.11[E], p. 15-84.) This is simply a case in which the plaintiff did not satisfy the purely mechanical requirement.

In the reply brief, Blue Water argues that the “futility of demand is well established in this case” and adverts to *Smith v. Dorn* (1892) 96 Cal. 73 and *James v. Steifer Mining Co.* (1918) 35 Cal.App. 778 for the first time, and without reference to pinpoint cites. Fairness militates against our consideration of arguments appellant raised for the first time in its reply brief. (See *Varjabedian v. City of Madera* (1977) 20 Cal.3d 285, 295, fn. 11.) Academically, we note that neither case establishes that the futility of making a demand excuses a plaintiff from informing the board in writing of the ultimate facts or serving the proposed pleading.

c. *Kramer*.

Blue Water complains that, “[as] almost an afterthought,” the defense attorney “submitted an order to the [trial court] that induced the [trial court] to sustain the demurrer to the fourth amended complaint without leave to amend as to any claims against [Kramer]. The fourth amended complaint does not charge [Kramer] with wrong doing associated with the transfer of the properties from [Rail Prop] to [Four Star]. [Kramer] had nothing to do with those transactions. Rather, the fourth amended complaint alleges that he conspired with Markowitz in committing other breaches of fiduciary duty to [Rail Prop].”

This is not an argument for reversal. As a result, the argument is not deserving of further attention.

d. *Alter ego* allegations.

Though not argued below, Blue Water contends that the allegation that Markowitz is the alter ego of Four Star prevented the trial court from sustaining the demurrer to the twelfth and thirteenth causes of action. Blue Water contends that Four Star “should have been allowed to remain as a party defendant if for no other reason than [that the alter ego allegations] . . . would impose on [Four Star] vicarious liability for any breach of fiduciary duty or other wrongs committed by Markowitz in his capacity as the manager of the defendant entities. The alter ego allegations are not addressed anywhere in the moving or reply papers on the demurrer, nor was the issue raised in oral argument, or in the order submitted by attorney Kurtz to the [trial court] following the ruling on demurrer.”

This belated argument was waived. (See *Doers v. Golden Gate Bridge Etc. Dist.*, *supra*, 23 Cal.3d at pp. 184–185, fn. 1.) Moreover, the argument has not been properly developed. Presumably Blue Water believes that if Markowitz is found liable in connection with the remaining causes of action, then Four Star will also be liable. But Blue Water did not cite any authority for this proposition. Also, Blue Water did not explain how Four Star could be kept in the action when the only two claims against it lack merit and were dismissed.

To fully put the issue to rest, we researched the issue and found that the law cuts against Blue Water. “The two principal questions to establish alter ego are whether there is ‘such a unity of interest and ownership between the corporation and its equitable owner that the separate personalities of the corporation and the shareholder do not in reality exist’ and whether there would be ‘an inequitable result if the acts in question are treated as those of the corporation alone.’ [Citation.]” (*VirtualMagic Asia, Inc. v. Fil-Cartoons, Inc.* (2002) 99 Cal.App.4th 228, 244–245.) The alter ego doctrine is used “to pierce the corporate veil so that a shareholder may be held liable for the debts or conduct of the corporation.” (*Postal Instant Press, Inc. v. Kaswa Corp.* (2008) 162 Cal.App.4th 1510, 1518 (*Postal Instant Press*).) Blue Water does not contend that Markowitz needs to be

held liable for the debts or conduct of the limited liability companies. Thus, Blue Water does not have a traditional alter ego claim.

Some jurisdictions recognize “reverse piercing” and allow a third party to obtain corporate assets to satisfy claims against individual shareholders. (*Postal Instant Press*, *supra*, 162 Cal.App.4th at p. 1518.) Tacitly, Blue Water advocates that California expand its law of alter ego and adopt the doctrine of reverse piercing. This would permit Blue Water to satisfy its claims against Markowitz through the assets of the limited liability companies. But *Postal Instant Press*, the only California case to consider the issue, rejected the doctrine as flawed. As a result, it is not the law in our state and we therefore decline to apply it.⁵

e. *Equitable distribution*.

In the reply brief, Blue Water contends that “[t]here is authority in California that an individual may be granted [damages] in favor of certain of the shareholders or members of a limited liability company, even though the action is [in] the nature of a derivative action, where the ordinary result of a derivative action . . . will constitute a windfall to certain shareholders or members.” Based on a trio of cases, Blue Water claims that the trial court “may equitably distribute damages in a derivative action to avoid the nonsensical result where the wrong doer is awarded a windfall as a result of the efforts of another shareholder or member.”

Not only is this argument tardy and deemed abandoned, but it presents no grounds for reversal. Even if the damages from a derivative action can be equitably distributed, Blue Water still lacks standing to sue in connection with the twelfth and thirteenth causes of action. This concludes any debate.

⁵ At oral argument, Blue Water argued for the first time that the demurrer could not be sustained without leave to amend as to Four Star because it is the alter ego of Rail Prop. This belated argument was waived.

2. Fraudulent conveyance.

In the fraudulent conveyance claim, Blue Water seeks to set aside conveyances from Rail Prop to Four Star and others. Once again, this is a derivative claim seeking redress for injury suffered directly by one of the limited liability companies. Because Blue Water did not plead the prelitigation written notice of facts required by statute, this claim cannot proceed.

3. Leave to amend.

Blue Water contends that it should have been granted leave to amend. This contention is unavailing.

In its opposition to the demurrer, Blue Water did not request leave to amend. However, it incorporated the opposition to a prior motion for judgment on the pleadings, which did request leave to amend. That opposition stated: “In accordance with the authority of [*Paclink*], [Blue Water] seeks leave to amend the complaint to state a derivative cause of action in the event the [trial court] grants the motion for judgment on the pleadings as to two of the causes of action of the amended complaint. [Blue Water] is certainly in the position to plead the matter as a derivative claim based upon [Blue Water’s] status as the holder of a fifty percent economic and membership interest in the [limited liability companies].”

Blue Water did not appear for the hearing on the demurrer. At no time—in its papers or orally—did it inform the trial court that it could allege that it gave the limited liability companies written notice of the ultimate facts of its claims or a copy of the proposed pleading prior to commencing suit. Blue Water does not suggest anything different on appeal. There was no abuse of discretion.

All other issues are moot.

DISPOSITION

The judgment is affirmed.

Four Star shall recover its costs on appeal.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS.

_____, J.
ASHMANN-GERST

We concur:

_____, P. J.
BOREN

_____, J.
CHAVEZ